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No. 92-462

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS H. GANNON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an indictment for making false statements to a grand jury was barred by collateral estoppel when the false statements involved events about which evidence was introduced in a prior prosecution that resulted in an acquittal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 967 F.2d 40. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered June 10, 1992. A petition for rehearing was denied on July 31, 1992. The petition for a writ of certiorari was filed on September 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 20, 1986, a grand jury in the Eastern District of New York indicted petitioner and his

corporation for conspiring to allocate and rig bids for road paving contracts involving the application of "slurry seal"—a mixture of liquid bituminous material, aggregate, and filler—let by the Town of Brookhaven, New York, and by the Village of Pelham Manor, New York, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The Town of Brookhaven is located in Suffolk County, New York, on Long Island. The Village of Pelham Manor is located in Westchester County, New York, north of New York City. Gov't C.A. Br. 2-3.

At trial, witnesses testified that petitioner and a co-conspirator had agreed that petitioner would be allocated the Brookhaven work in exchange for the co-conspirator's receiving the Pelham Manor work. As proof of intent, the government introduced evidence that petitioner had participated in another slurry seal conspiracy involving road contracts let by Suffolk County itself. Pet. App. 6a. Petitioner took the stand and denied any involvement in bid-rigging and allocation in Brookhaven and Pelham Manor. He further denied that he had attended any meetings at which the rigging or allocation of bids let by Suffolk County was discussed. *Ibid.* The jury acquitted petitioner on August 20, 1986. Pet. App. 7a.

2. The grand jury that had issued the Pelham Manor/Brookhaven indictment continued its investigation of bid-rigging in the sale of asphalt products on Long Island after petitioner's acquittal. As part of that investigation, it subpoenaed petitioner, who testified on October 15, 1986, under a grant of immunity pursuant to 18 U.S.C. 6002. Pet. App. 7a; Gov't C.A. Br. 5.

Most of petitioner's grand jury testimony—and most of the statements that formed the basis of his

perjury indictment—did not relate to the events about which evidence was introduced during his bid-rigging trial. Thus, petitioner was not questioned before the grand jury about a conspiracy to rig bids in Brookhaven or Pelham Manor, the conduct for which he had been tried and acquitted. Gov't C.A. Br. 5. But petitioner was asked whether he had attended any meetings at which the allocation or rigging of bids let by Suffolk County was discussed, and he was asked whether he had ever had conversations about such bid-rigging or allocation. Petitioner denied having had such conversations and having attended such meetings. *Ibid.*; Pet. App. 19a-23a. He was indicted for those denials and other statements made to the grand jury that are alleged to have been knowingly and materially false.

3. Petitioner asked the district court to dismiss the indictment on double jeopardy and collateral estoppel grounds. He claimed that in his bid-rigging trial the government placed before the jury, and the jury necessarily decided, the question whether he attended meetings at which the rigging or allocation of the bids let by Suffolk County was discussed. The district court, however, held that petitioner had never been placed in jeopardy for a conspiracy regarding Suffolk County bids and denied the motion to dismiss. C.A. App. A341.

Petitioner took an interlocutory appeal pursuant to *Abney* v. *United States*, 431 U.S. 651 (1977). The court of appeals rejected petitioner's double jeopardy and collateral estoppel claims. It held that "[n]one of the perjury charges relate to the offense for which he was first prosecuted," since the earlier prosecution charged "a conspiracy to rig bidding for Pelham

Manor and Brookhaven," while the perjury charges "relate to bid rigging for the Suffolk County highway districts and possibly as to certain other Long Island Municipalities." Pet. App. 13a. Although evidence as to the Suffolk County bid-rigging had been admitted at petitioner's conspiracy trial under Fed. R. Evid. 404(b), the court of appeals noted that, under this Court's decision in *United States* v. *Felix*, 112 S. Ct. 1377, 1382-1383 (1992), admission of evidence of other crimes under Rule 404(b) does not constitute prosecution for those crimes. The court also rejected petitioner's contention that "acquittal of the Pelham Manor/Brookhaven conspiracy *necessarily* amounted to an acquittal as to the Suffolk County conspiracy." Pet. App. 13a.

ARGUMENT

1. Petitioner is mistaken in arguing (Pet. 6, 10-14) that the court of appeals failed to consider his collateral estoppel argument. The court expressly observed that petitioner "relie[d] upon * * * the doctrine of collateral estoppel," Pet. App. 3a, but found that petitioner's reliance on that doctrine was misplaced. Pet. App. 13a.

Collateral estoppel "bars relitigation between the same parties of issues actually determined at a previous trial." *Ashe* v. *Swenson*, 397 U.S. 436, 442 (1970). As this Court held in *Dowling* v. *United States*, 493 U.S. 342, 350 (1990), "[T]he burden [is] on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." A court considering whether an issue has been necessarily decided by a previous jury verdict must "examine the record of a prior proceeding, taking into account the pleadings, evi-

dence, charge, and other relevant matters." *Ashe*, 397 U.S. at 444 (citation omitted).

The court of appeals found that the issue underlying the instant perjury indictment—whether petitioner participated in discussions of bids for work let by Suffolk County—was not necessarily decided by the jury that acquitted him of conspiring to rig bids for contracts let by Pelham Manor or Brookhaven. Pet. App. 13a. In his previous trial, petitioner was charged only with conspiring to rig bids for contracts let by the Town of Brookhaven and the Village of Pelham Manor, Pet. App. 2a-3a, and the jury was instructed that the only issue before it was whether petitioner had conspired to rig bids for contracts let by those two municipalities. Pet. App. 7a. The jury thus was not required in petitioner's previous trial to decide whether he had rigged bids for Suffolk County contracts, see *Dowling*, 493 U.S. at 350-352, much less to decide whether he had done so beyond a reasonable doubt, see *Dowling*, 493 U.S. at 347-350. Accordingly, petitioner's acquittal on the previous charges does not bar his trial on the instant indictment.

2. Petitioner also contends (Pet. 7-9) that the court of appeals incorrectly applied this Court's recent decision in *United States* v. *Felix*, 112 S. Ct. 1377 (1992). As the court of appeals recognized, however, this case is squarely governed by *Felix*. In *Felix*, as in the instant case, evidence of a prior crime was introduced for purposes permitted by Fed. R. Evid. 404(b), and the government then prosecuted the defendant for that prior crime. In *Felix*, this Court held that the two prosecutions were not for the same offense because "the introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." 112 S. Ct. at

1383. Accordingly, just as this Court in *Felix* determined that the Double Jeopardy Clause did not bar the defendant's later trial, the court of appeals properly determined that the Double Jeopardy Clause does not bar petitioner's trial on the instant indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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